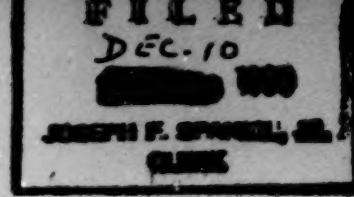


90-924



NO. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term 1990

GUADALUPE RAMOS.

Petitioner

V

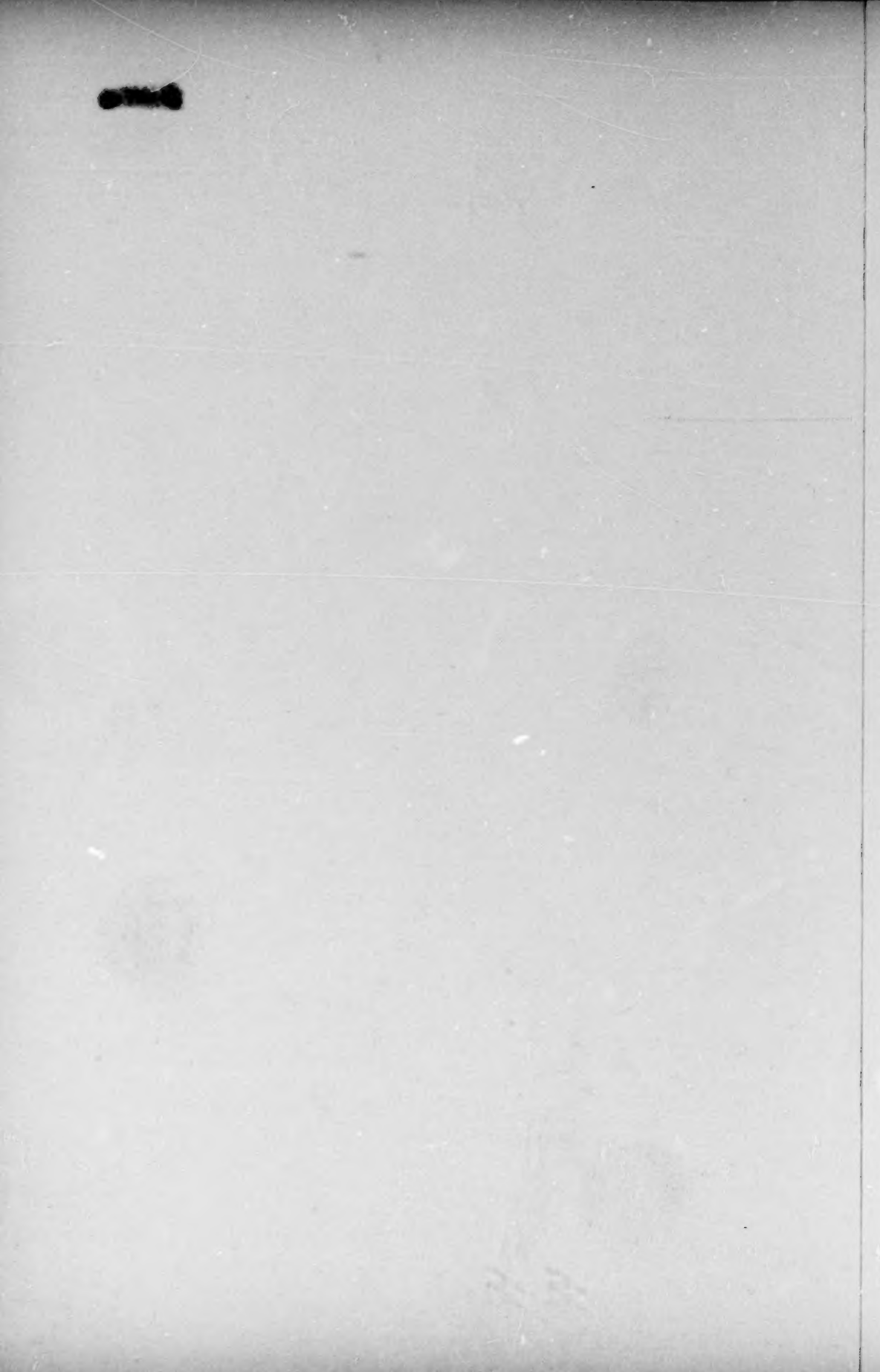
JAMES A. BAKER III  
SECRETARY OF THE TREASURY

Respondent

PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Shelby W Hollin  
Attorney at Law  
7710 Stagecoach  
San Antonio Tx 78227  
Tel (512) 674 2584  
State Bar # 09879000



## QUESTIONS PRESENTED FOR REVIEW

I. Did the Court of the Fifth Circuit fail to apply the criteria for burden of proof as required by the U S Supreme Court in Texas Department of Community Affairs versus Burdine 450 U S 248 (1981) in determining the prima facie case can be rebutted by articulating vague inoffensive sounding subjective criteria?

A. Did the courts err in determining the record did not show the articulated explanation to be pretextual and without credence as allowed by criteria established in Burdine, supra?

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of the Fifth Circuit fail to apply the correct law burden of proof as required by the U. S. Supreme Court in Texas Department of Community Affairs v. Texas Business 420 U.S. 168 (1974) in determining the prima facie case was proved by articulated vague suggestive sounding suggestive evidence?

A. Did the Court fail to determine the record did not show the articulated suggestion to be pretextual and without evidence as allowed by California established in California?

## **PARTIES**

The parties to the proceedings are set forth as follows;

Guadalupe Ramos, employee of the Internal Revenue Service at Austin Texas.

Petitioner

James A Baker III Secretary of the Treasury who is the head of the federal agency involved.

Respondent



## TABLE OF CONTENTS

Table of Authorities. . . . .	iv
Citations of the opinions of the Lower Court. . . . .	1
Brief for Petitioner	
Opinion Below. . . . .	1
Statement of Jurisdiction. . . . .	3
Statute Involved. . . . .	3a
Statement of the Case. . . . .	4
Argument. . . . .	5
Conclusion. . . . .	7
Certificate of Service. . . . .	10
Appendix A . . . . .	11

TABLE OF CONTENTS

Table of Authorities	iv
Citations of the opinions of the Lower Court	1
Brief for Petitioner	2
Opinion below	2
Statement of Jurisdiction	3
Statute involved	12
Statement of the Case	4
Argument	5
Conclusion	7
Certificate of Service	10
Appendix A	11



TABLE OF AUTHORITIES

<u>Barnes v Yellow Freight Sys</u> 830 F2d 61 (5th Cir 1987). . . . .	A6
<u>Crawford v Western Elec Co</u> 614 F2d 1300 (5th Cir). . . . .	A9
<u>Lee v Conecuh County Bd of Educ</u> 634 F2d 959 (5th Cir 1981). . . . .	A10
<u>Lewis v NLRB</u> 750 F2d 1266 (5th Cir (1985). . . . .	A9
<u>Lindsey v Southwestern Bell Tel Co</u> 546 F2d 1123 (5th Cir 1977). . . . .	A26
<u>Loeb v Textron Inc</u> 600 F2d 103 (1st Cir 1979). . . . .	A26
<u>McDonnell Douglas Corp v Green</u> 411 US 792. . . . .	A5,A22
<u>Price Waterhouse v Hopkins</u> 109 S Ct 1775 (1989). . . . .	A23
<u>Texas Department of Community Affairs v Burdine</u> 450 U S 248 (1981). . . . .	A5,A22
<u>United States Postal Service Board of Governors v Aikens</u> 460 U S 711 (1983). . . . .	A6,A23
<u>Walsdorf Board of Commissioners for East Jefferson Levee District</u> 857 F2d 1047. . . . .	5,A25
<u>Watson v Fort Worth Bank &amp; Trust Co</u> 108 S Ct 2777 (1988). . . . .	7 A3



**OPINIONS BELOW**

Ramos v Baker, 98-7020 (5th Cir Sep 12 1990). . . . . Al

Ramos v Baker, A 87-CA-455 . . . Al3

Treasury Department Working with the Internal Revenue Service.

petitioner

v

JAMES A. BAKER, III, Secretary of the Treasury

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR PETITIONER  
OPINIONS BELOW

Petitioner, Mr. Baker, respectfully

asks this Court that he be seen acquitted by

the decision reported herein as Quadruple

Ramos versus James A Baker III, Secretary

of the Treasury, No 98-7020, (5th Cir

1990). That the decision contained a

majority in favor of respondent by the

United States District Court for the



NO. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term 1990

GUADALUPE RAMOS, federal employee of the  
Treasury Department working with the  
Internal Revenue Service.

Petitioner

V

JAMES A. BAKER III, Secretary of the  
Treasury

Respondent

On Petition for a Writ of Certiorari  
to the United States Court of Appeals  
For the Fifth Circuit

BRIEF FOR PETITIONER  
OPINIONS BELOW

Petitioner, Mr Ramos represents unto  
this Court that he has been aggrieved by  
the decision reported below as Guadalupe  
Ramos versus James A Baker III, Secretary  
of the Treasury, No 89-7020, (5th Cir  
1990). That the decision sustained a  
judgment in favor of respondent by the  
United States District Court for the

IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term 1935

GOVERNMENT HANCOCK, Federal employee of the  
Treasury Department, working with the  
Internal Revenue Service,

Petitioner

v

DR. A. HANCOCK, Secretary of the  
Treasury

Respondent

as petitioner for a writ of certiorari  
to the United States Court of Appeals  
for the Fifth Circuit

WRIT FOR PETITIONER  
CERTIORARI ALLOW

Petitioner, Mr. Hancock, registered with  
this Court that he has been appointed by  
the decision reported before the  
Hanco v. Hancock, 288 U.S. 141, 53 S.Ct. 1001.  
of the Treasury, No. 52-7330, 288 U.S. 141.  
1901. The decision contained a  
judgment in favor of respondent by the  
United States District Court for the

STATEMENT OF JURISDICTION

Western District of Texas cited as  
Guadalupe Ramos v James A Baker III,  
Secretary of the Treasury,, No  
A-87-CA-455, (WD Tx 1990)





## STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered September 12, 1990.

There was no request for a hearing and no extension of time within which to file the petition for a writ of certiorari.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254 (1).



STATUTE INVOLVED

The following sections of Title VII are involved in this case. 42 U.S.C. §2000e- 2(a), and 42 U.S.C. §2000e-3(a), which provide in pertinent part:

It shall be unlawful employment practice for an employer to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment because of --race,color religion, sex or national origin.

It shall be unlawful employment practice for an employer to discriminate against any of its employees - - because he has opposed any practice made unlawful employment practice by this title [42 U.S.C. §§2000e-2000e-17] or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title [42 U.S.C. §§2000e - 2000e-17].

STATUTE INVOLVED

The following sections of Title VII are involved in this case: 42 U.S.C. 2000e-2(a), and 42 U.S.C. 2000e-3(a).

which provide in pertinent part:

It shall be unlawful employment practice for an employer to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment because of race, color, religion, sex or national origin.

It shall be unlawful employment practice for an employer to discriminate against any of its employees - because he has opposed any practice made unlawful employment practice by this title (42 U.S.C. 2000e-2(a)) or because he has made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing under this title (42 U.S.C. 2000e-3(a)).

### STATEMENT OF THE CASE

Mr Ramos brought civil action alleging that the Internal Revenue Service had discriminated against him because of his national origin (hispanic) and for filing prior EEO complaints. The district court held that an unlawful motive played neither some part in the employment decision nor was a significant factor in the case. The decisions retarding the two promotion actions were appealed to the Fifth Circuit. The prior decisions do not mention or cite any reference to retaliation by the employer. The Fifth Circuit affirmed.

Jurisdiction to the United States Court of Appeals for the Fifth Circuit was under 28 U.S.C. §1291 and 28 U.S.C. § 1294.



## ARGUMENT

The district court cited Walsdorf v Board of Commissioners for East Jefferson Levee District 857 F2d 1047, 1052 and note 1 (5th Cir 1988) for its holding that unlawful motive played neither 'some part in the employment decision' nor was a significant factor' in the case. The referenced footnote delineates the differences of opinion between the various circuit courts regarding the applicable standard of causation in determining Title VII liability.

It cannot be said that the evaluation of Ramos by three ranking panel members resulting in the same 'identical' scores on each ranking element was simply a coincidence or that the court had any proof that such identical scores were the result of a performance evaluation.

## ASSIGNMENT

The district court cited Waldorf & Sons  
of Corporations for East Atlantic  
District 257 (201, 1057, 1053 and note 1  
(258 (27, 1988) for its holding that  
unlawful motive played neither 'some part'  
in the employment decision' nor was a  
significant factor' in the case. The  
cited case, Waldorf & Sons, believed the  
difference of opinion between the various  
district courts regarding the applicable  
standard of causation in determining Title  
VII liability.

It cannot be said that the violation of  
Title VII by three (three) persons  
resulting in the same 'identical' result  
on each and every element was simply a  
coincidence or that the court had any  
proof that such identical result was the  
result of a performance evaluation.



Mr Ramos was encumbering the position in question via a temporary promotion at the time he was nonselected in September 1982. The employer claimed that 'national office experience' was the deciding factor in selecting the anglo male for the position. Mr Ramos was the only Hispanic GS 12 in the organization and the only Hispanic GS 12 candidate for the position. The record reflects ample testimony (pp 76-84 and 109-111, trial transcript) substantiating the claim that the explanation given was pretextual and without credence.

The Fifth Circuit accepted the employer's vague, inoffensive sounding subjective criteria, i.e., 'broader range of experience' as a legitimate nondiscriminatory reason for the nonselection of Mr Ramos.

Mr. Borge was employed in the position of  
question was a temporary position at the  
time it was connected in September 1961.  
The employer advised that national office  
experience was the deciding factor in  
selecting the single male for the position.  
Mr. Borge was the only applicant for the  
position and the only Hispanic in  
the organization and the only Hispanic in  
the position for the position. The position  
was filled with a male applicant who was  
not a Hispanic. The position was filled  
with a male applicant who was not a Hispanic.  
The claim that the position was filled  
with a male applicant who was not a Hispanic  
is not supported by the evidence.

The claim that the position was filled  
with a male applicant who was not a Hispanic  
is not supported by the evidence. The position  
was filled with a male applicant who was not  
a Hispanic. The position was filled with a  
male applicant who was not a Hispanic. The  
position was filled with a male applicant who  
was not a Hispanic. The position was filled  
with a male applicant who was not a Hispanic.  
The position was filled with a male applicant  
who was not a Hispanic. The position was  
filled with a male applicant who was not a  
Hispanic. The position was filled with a  
male applicant who was not a Hispanic.

The prior decisions ignore the fact that there were no established business reasons for 'national office experience' or a 'broad range of experience'. Neither decision evaluated the employer's response against the established criteria for a business necessity as explained in Watson v Fort Worth Bank and Trust 108 S Ct 2777 (1988)

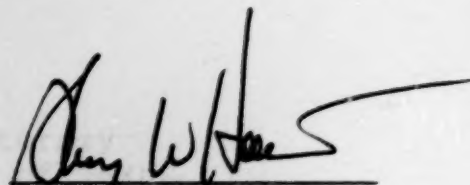
#### CONCLUSION

The record reveals a complete lack of selection criteria, selection guidelines, records of evaluating candidates during the promotion interview and only the articulation of the vague unsubstantiated subjective criteria of 'selecting the best qualified'. Pretext may be established either directly by demonstrating that a discriminatory reason more likely motivated the employer or indirectly

PUBLISHER'S NOTE:

ORIGINAL PAGINATION IS NOT CONTINUOUS.

by showing that the employer's proffered explanation is unworthy of belief. Mr Ramos did so; however, the lower courts ignored the Burdine supra, ruling and issued erroneous decisions.



SHELEY W HOLLIN  
Attorney at Law  
7710 Stagecoach  
San Antonio Tx 78227  
Tel 512 674 2584  
State Bar # 09879000



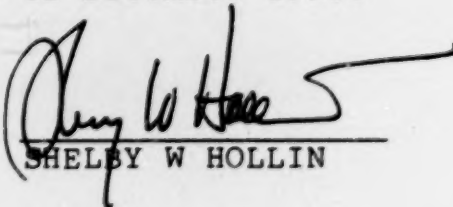
CERTIFICATE OF SERVICE

I certify that three copies of the foregoing petition with appendix was mailed this date, via certified mail, return receipt requested to the following:

Ronald F Ederer  
United States Attorney  
Western District of Texas  
727 E Durango Blvd Suite A 601  
San Antonio Texas 78206

Solicitor General  
Department of Justice  
Washington DC 20530

dated: 10th day of December 1990.

  
\_\_\_\_\_  
SHELBY W HOLLIN

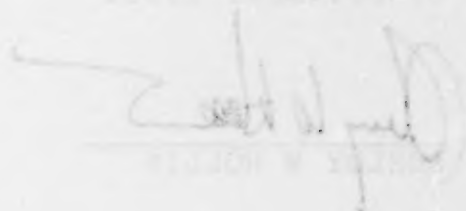
CERTIFICATE OF SERVICE

I certify that three copies of the foregoing petition with response was mailed this date, via certified mail, return receipt requested to the following:

Wanda E. Linder  
United States Attorney  
Western District of Texas  
155 E. Guadalupe Blvd. Suite A 201  
San Antonio, Texas 78205

Attorney General  
Department of Justice  
Washington DC 20530

Dated: 10th day of December 1995.

  
Charles W. Hollis



IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 29-1728  
January 14, 1991

GUADALUPE RAMOS, Plaintiff-Appellant

vs.

JAMES A. BAKER, III,  
Secretary of the Treasury,  
Defendant-Appellee

APPENDIX 'A'

Appeal from the United States  
District Court for the  
Southern District of Texas  
Case No. 89-1728  
September 14, 1990

Before: KAHN, Chief Judge, and

DAVIS, Circuit Judge.

PER CURIAM:



IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

---

No. 89-7020  
Summary Calendar

---

GUADALUPE RAMOS,           Plaintiff-Appellant  
versus

JAMES A. BAKER, III,  
Secretary of the Treasury,  
Defendant-Appellee.

---

Appeal from the United States  
District Court for the  
Western District of Texas  
(A-87-CA-455)  
(September 12, 1990)

---

Before CLARK, Chief Judge, POLITZ and  
DAVIS, Circuit Judges.

PER CURIAM:\*

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

NO. 83-7050  
Remand Calendar

WILLIAMSON, HARRY, Plaintiff-Appellant

vs.

JAMES A. BAKER, III,  
Secretary of the Treasury,  
Defendant-Appellee.

Appeal from the United States  
District Court for the  
Western District of Texas  
1A-87-CA-455  
(September 12, 1990)

Before CLARK, Chief Judge, POLITZ and  
DAVIS, Circuit Judges.  
PER CURIAM.

Plaintiff-Appellant Guadalupe Ramos ("Ramos"), an Hispanic male, challenges the district court's ruling that Ramos's employer, the Internal Revenue Service ("IRS"), did not discriminate against him when it failed to promote him on two occasions. Ramos exhausted his administrative remedies and brought a civil action alleging that the IRS violated Title VII by discriminating against him on the basis of his national origin (Mexican). His complaint alleged five instances of discrimination. After a bench trial, the district court made findings of fact and conclusions of

---

\* Local Rule 47.5 provides "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expenses on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.



law in which he ruled that the IRS had not violated Title VII. Ramos only appeals the district court's ruling with respect to two promotion decisions. He disputes the factual conclusion that the IRS articulated legitimate nondiscriminatory reasons for its promotion decisions and argues that the IRS's use of subjective criteria shows that the district court's conclusion was erroneous. He also argues that proof that an employer used subjective promotion criteria is sufficient to establish that the employer's articulated reasons are pretexts for unlawful discrimination. We reject both arguments and affirm.

In *Watson v. Fort Worth Bank & Trust*, \_\_\_ U.S. \_\_\_, 108 S.Ct. 2777, the Supreme Court held that the disparate impact analysis may be appropriate for Title VII challenges to subjective or discretionary





employment practices. See *id.*, 108 S.Ct. at 2786-87. In a disparate impact case, plaintiff alleges that facially neutral employment practices have an adverse impact on a protected group. "The evidence in these...cases usually focuses on statistical disparities, rather than on specific incidents..." *Id.*, 108 S.Ct. at 2784-85. Ramos has not argued that the IRS's promotion practices adversely affect protected groups, and he has offered no evidence of statistical disparities. He only claims that the IRS discriminated against him by failing to promote him on two occasions. His claim therefore is one of disparate treatment.

The Supreme Court established a shifting burden structure for analyzing disparate treatment claims under Title VII when dismissal short of trial was



contemplated. First, the plaintiff must establish a prima facie case of discrimination. The defendant then has the burden to articulate legitimate nondiscriminatory reasons for its decision. Finally, the plaintiff then has the burden to show that the employer's articulated reasons are merely a pretext for unlawful discrimination. See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-56, 101 S.Ct. 1089, 1093-95 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-805, 93 S. Ct. 1817, 1823-26 (1973).

Even though there was a fully tried case, the district court applied all steps in the disparate treatment analysis. In such a case, the court may move directly to the factual conclusion as to whether discrimination is established by the



whole of the proof. See *United States Postal Serv. v. Aikens*, 460 U.S. 711, 713-16, 103 S.Ct. 1478, 1481-82 (1983). He found: (1) that Ramos established a prima facie claim of discrimination, (2) that the IRS articulated legitimate nondiscriminatory reasons for its decisions, and (3) that Ramos failed to show that the IRS's articulated reasons were mere pretexts for discrimination. We will not disturb the district court's fact findings unless they are clearly erroneous. See *Barnes v. Yellow Freight Sys.*, 830 F.2d 61, 62 (5th Cir. 1987).

Ramos's first claim of discrimination stems from the 1981 decision of the IRS not to promote him to GS 13 and to promote a white male instead. The district court found that the IRS did not place Ramos on the "Best Qualified List" for the



promotion because his numerical performance evaluation was too low. Ramos's supervisor prepared the promotion appraisal based on his personal observations and information from Ramos's previous manager. The district court further found that the appraisal accurately evaluated Ramos's performance, that it contained no evidence of discrimination, and that Ramos failed to show that the IRS's performance evaluation was a pretext for discrimination.

Ramos also claims that the IRS discriminated against him by not promoting him to GS 13 in 1982. Ramos made the "Best Qualified List" in 1982, and he interviewed for the position. The district court found that the IRS selected a white male who had a broader range of experience for the position. In fact,

procedural process. His personal  
performance evaluation was low.  
Ramon's supervisor prepared the promotion  
appraisal based on his personal  
observations and information from Ramon's  
previous manager. The district court  
thereby found that the appraisal  
accurately reflected Ramon's performance,  
that it contained no evidence of  
discrimination, and that Ramon failed to  
show that the IRS's performance evaluation  
was a pretext for discrimination.

Ramon also claims that the IRS  
discriminated against him by not promoting  
him to AS in 1981. Ramon made the  
"Last Qualified List" in 1981, and he  
interviewed for the position. The  
district court found that the IRS selected  
a white male and not a member of  
any race for the position. In fact,



the record shows that the person who received the position already held a GS 13 position in Washington, D.C.. The district court concluded that the IRS again offered a legitimate nondiscriminatory reason and that Ramos failed to show that it was a pretext for discrimination.

The district court's findings were not clearly erroneous. Ramos argues, however, that the IRS used subjective criteria in making its promotion decisions. He contends an employer cannot articulate nondiscriminatory reasons for an employment decision when the employer considers subjective facts because an employee cannot effectively rebut subjective evaluations. We disagree.

The Supreme Court has recognized that



subjective evaluations of employees are necessary in many situations. See Watson, 108 S.Ct. at 2787 (noting that many important qualities such as job performance often cannot be objectively measured, and that performance evaluations often differ). This circuit has repeatedly held that the use of subjective criteria does not constitute discrimination per se. E.g., Lewis v. National Labor Relations Bd., 750 F.2d 1266, 1276 (5th Cir 1985). Although we have recognized that the use of subjective criteria may serve to mask latent discrimination, see Crawford v. Western Elec. Co., 614 F.2d 1300, 1315-17 (explaining that use of wholly subjective evaluations to determine whether an individual is qualified for a position is inherently suspect), we refuse to hold that an employer may not offer subjective evaluations in order to rebut a

subjective evaluation of employees is  
necessary in many situations. The  
100 R.C. at 178V. (finding that many  
important qualities such as  
performance often cannot be objectively  
measured, and that subjective evaluations  
often differ). This circuit has repeatedly  
held that the use of subjective criteria  
does not constitute discrimination per se.  
E.g., *Woods v. National Labor Relations Bd.*, 700  
F.2d 1366, 1376 (5th Cir. 1982). Although  
we have recognized that the use of  
subjective criteria may raise a red  
flag, discrimination has not been found  
without more. Cf. *EEOC v. ...*, 1413-17  
... that use of highly subjective  
criteria in determining whether an  
individual is qualified for a position is  
inherently suspect, we refuse to hold  
that an employer may not utilize subjective  
evaluations in order to select a

plaintiff's prima facie case. Such a rule would make it impossible for many employers to defend Title VII suits because many jobs necessarily involve subjective qualities. Subjective evaluations may be especially important when, as here, an employer must select an employee from a group of qualified applicants.

We also disagree with the argument that Title VII plaintiffs cannot rebut an employer's subjective evaluations. Plaintiffs may be able to offer witness testimony and proof of job experience and other qualifications. They can also directly compare their qualifications with those of the other applicants. For example, in *Lee v. Conecuh County Bd. of Educ.*, 634 F.2d 959 (5th Cir. 1981), a case cited by Ramos, the employee offered objective



evidence of his superior qualifications and was able to successfully rebut the employer's subjective evaluations. See *id.* at 963. Moreover, plaintiffs can establish Title VII violations without proving discriminatory intent by attacking the subjective evaluation policy under the disparate impact theory. See *Watson*, 108 S.Ct. at 2786-87.

The IRS articulated legitimate nondiscriminatory reasons for its decisions--job performance and experience. Ramos offered no evidence of intentional discrimination. The fact that Ramos could not prove his case does not mean that other Title VII plaintiffs will not be able to prove theirs.

Ramos also argues that, standing alone, his proof that the IRS used

...of his superior qualifications  
and was able to successfully resist the  
employer's subjective evaluation. See id.  
at 501. Moreover, Plaintiff has  
established Title VII violations without  
presenting discriminatory intent by showing  
the subjective evaluation policy when the  
disparate impact theory. See *Wade*, 105  
S.Ct. at 1700-01.

The two articulated legitimate  
business reasons for the  
disparate impact are job performance and experience.  
Wade offered no evidence of intentional  
discrimination. The fact that Wade could  
not prove his case does not mean that  
other Title VII plaintiffs will not be  
able to prove theirs.

Wade also argues that, standing  
alone, his proof does not establish



subjective factors demonstrates that the IRS's articulated reasons are pretexts for unlawful discrimination. We disagree. The fact that an employer uses subjective criteria does not mean that the employer unlawfully discriminates. A Title VII plaintiff must still prove discriminatory intent under the disparate treatment theory, or an adverse impact on a protected group under the disparate impact theory. Ramos has proven neither.

The judgment appealed from is

**AFFIRMED**

Subjective factors emphasized that the  
the organization's reasons are primary for  
unhappy situation, we disagree.  
The fact that an employee does not  
dislike does not mean that the employee  
necessarily is dissatisfied. I think VII  
partially may still prove discriminatory  
reasons under the disparate treatment  
theory. We are advised that the  
protected group under the disparate impact  
theory. There are known effects.

The system applied to is

attendant

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

CRIMINAL DIVISION

CONRAD W. JAMES,	1
Plaintiff,	2
	3
	4
	5
JAMES A. BLAIR, III,	6
Defendant,	7
By and for the	8
Attorney General,	9
	10

Case No.   
A-87-Cr-102

EXHIBIT

**APPENDIX 'B'**

Exhibit B consists of the original and copies of the documents and photographs which were submitted to the Attorney General and the District Attorney for the District of Columbia, and which are being submitted to the Court as follows:

1. A copy of the letterhead memorandum dated and captioned as above, and which was submitted to the Attorney General and the District Attorney for the District of Columbia, and which is being submitted to the Court as follows:

7

18-11-1914

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION

GUADALUPE RAMOS,	\$	
Plaintiff,	\$	
	\$	
v.	\$	Civil No.
	\$	A-87-CA-455
JAMES A. BAKER, III,	\$	
SECRETARY OF THE	\$	
TREASURY,	\$	
Defendant.	\$	

J U D G M E N T

In accordance with the Finding of Facts and Conclusions of Law entered in the above-styled and numbered cause on this case, the Court enters its judgment as follows:

IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff, Guadalupe Ramos, take nothing in his suit against Defendant, James A. Baker, III, Secretary of the Treasury. Costs of Court are taxed against Plaintiff, for which let execution issue if not timely paid.



SIGNED this 31st day of August, 1989.

WALTER S. SMITH, JR.  
UNITED STATES DISTRICT  
JUDGE

JAMES A. GILLEY,  
SECRETARY OF THE  
COURT,

WASHINGTON, D.C.





IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

GUADALUPE RAMOS,	\$	
Plaintiff,	\$	
	\$	
v.	\$	Civil No.
	\$	A-87-CA-455
JAMES A. BAKER,	\$	
SECRETARY OF THE	\$	
TREASURY,	\$	
Defendant.	\$	

FINDINGS OF FACT  
AND  
CONCLUSIONS OF LAW

On the 22th day of August, 1989, this case came on for trial before the Court. In accordance with the testimony and evidence presented and upon consideration of argument of counsel, the following findings of fact and conclusions of law are hereby entered.

Finding of Fact

1) Plaintiff, Guadalupe Ramos is a Hispanic male, who began his employment

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION

2	CHANDLER BAKER
2	Plaintiff,
2	
2	Civil No.
2	A-57-CA-422
2	
2	JAMES A. BAKER,
2	Defendant of the
2	Plaintiff,
2	Defendant.

SYNOPSIS OF FACTS  
AND  
CONCLUSIONS OF LAW

In the fifth day of August, 1930, this  
case came on for trial before the Court,  
in accordance with the subpoena and  
evidence presented and upon consideration  
of argument of counsel, the following  
findings of fact and conclusions of law  
are hereby entered.

Finding of Fact

It is hereby found that Baker is a  
single male, who began his employment

with the Internal Revenue Service in 1974.  
He transferred to Austin, Texas in 1976.

2) Plaintiff filed this action on August 13, 1987, alleging five instances of discrimination based on race, and retaliation for participation in the EEO process.

3) Plaintiff's complaints are as follows:

- a) That in October of 1981, he was not selected to a level 13 position. (Complaint One).
- b) That in 1982, he was retaliated against because of EEO activities when he was not allowed to be an acting manager and to attend a manager's meeting (during the absence of another employee). Also, that he had been evaluated excessively by his supervisor. (Complaint Two).
- c) That he was not selected to a level 13 position in September of 1982. (Complaint Three).
- d) That he was retaliated against because of EEO

with the Internal Revenue Service in 1974.  
He is registered in Kansas, Texas in 1972.  
1/ Plaintiff filed this action on  
August 13, 1987, alleging that defendant  
of discrimination based on race, sex  
violation of the Constitution of the United States.

2/ Plaintiff's complaint and the  
following:

1. That in 1974, at 1987,  
he was not allowed to  
work in the  
company.

2. That in 1987, he was  
discriminated against because  
of his race, color, sex, and  
age and was allowed to be  
employed by the company and to  
receive a salary and benefits  
the same as those of the  
employees. That, when he  
was denied employment  
because of his race, color,  
sex, and age.

3. That he was not allowed  
to work in the company  
because of his race, color,  
sex, and age.

4. That he was not allowed  
to work in the company  
because of his race, color,  
sex, and age.

activities when he was not allowed to attend an excise tax school in 1983.  
(Complaint Four)

- e) That he was retaliated against because of EEO activities when he was not allowed to attend an estate and gift tax school in 1983.  
(Complaint Five).

4) Plaintiff was not placed on the "Best Qualified List" for the promotion action in Complaint 1 because his numerical evaluation was too low.

5) Plaintiff's supervisor, Osman Ahmed, prepared the promotion appraisal for the promotion action in Complaint One based upon his personal observations and information from Plaintiff's previous manager. The appraisal accurately evaluated Plaintiff's performance. There is no evidence of any racial discrimination in this instance.

6) As to Complaint Two, Plaintiff's supervisor at that time was Mr. Jack

1  
involved when he was not  
allowed to attend on either  
the 1st or 2nd of 1901  
(Complaint 1st)

2  
That he was retained  
because of the  
services which he was not  
allowed to attend on either  
the 1st or 2nd of 1901  
(Complaint 2nd)

3  
That he was not placed on the  
"Base Complaint 1st" for the purpose  
of being in Company 1 because his  
medical condition was poor.

4  
That he was a member of the  
Army, and that he was  
not the person who was in Company 1  
because upon his personal observation and  
information from his own knowledge  
and the official records  
which he had seen, there  
is no evidence of his being  
in Company 1 on the 1st of 1901.

5  
That he was not in Company 1 on the 1st of 1901  
because he was not in the  
Army at that time.

Monasmith. Mr. Monasmith conducted five reviews of Mr. Ramos' work during a four month period. This was not an unusual or excessive level of review. The reviews indicated continued performance improvement and included complimentary language. There was no need or occasion during that period to utilize Plaintiff as an acting manager. There is no evidence of any retaliation surrounding this complaint.

7) Plaintiff made the "Best Qualified List" for the promotion action referenced in Complaint Three and was interviewed for the position. However, another individual was selected for the position. The selected individual had a broader range of experience for the position than did Plaintiff. There is no evidence of racial discrimination in this instance.

Accordingly, Mr. Rosenblatt conducted five  
reviews of Mr. Baker's work during a four  
month period. This was not an unusual or  
excessive level of review. The reviews  
indicated continued performance  
improvement and indicated satisfactory  
progress. There was no need for correction  
during this period as a result of the  
on going nature. There is no evidence  
of any continuing deterioration in his  
performance.

It is noted that the "Poor"  
Classification for the previous period  
determined in Complaint Case No. 1 was  
determined for the period January,  
1960. Individual was released for the  
period. The subject indicated that a  
change in his performance for the  
period was due to the fact that there is no  
evidence of any continuing deterioration in his  
performance.



8)            Regarding    Complaint    Four, Plaintiff was not selected for Excise Tax School in January 1983, was denied an opportunity to attend a manager's meeting, February 7 thorough 11, 1983, and was denied an opportunity to be acting manager February 7 through 21, 1983. Plaintiff was not sent to Excise Tax School because there was little need for that training In Plaintiff's work and because Plaintiff was to be sent to Windfall Profits Tax School, a more important course. Plaintiff was not included in the manager's meeting because there was no useful role for him there. Plaintiff's supervisor maintained a practice of rotating acting manager assignments among his employees. During the period from September 20, 1982, through March 4, 1983, Plaintiff was acting manager for more days than any other employee in his unit. There is no



evidence that Plaintiff was retaliated against concerning this complaint.

9) As to Complaint Five, Plaintiff alleges retaliation for prior EEO activity when he was denied estate and gift taxation training in June, 1983. This training was not appropriate to Plaintiff's position and was not given to other similarly situated employees. The type of work for which the training was appropriate was performed by Estate and Gift Tax Attorneys, not by Revenue Agents.

10) Plaintiff has presented a prima facie case as to each complaint.

11) Defendant has articulated legitimate non-discriminatory reasons for each of its actions regarding the Plaintiff and such reasonable basis was not a pretext to mask discrimination. Neither the national origin of Ramos nor retaliation for EEO activity were factors



in the actions or inactions regarding Plaintiff.

12) Any finding of fact which should more appropriately be a conclusion of law is deemed so.

#### Conclusions of Law

1) The issues before the Court in this proceeding are whether Plaintiff was discriminated against on the basis of national origin or retaliation for EEO activity when he was not promoted to the position of Revenue Agent manager on October 18, 1981 and/or when not promoted On September 24, 1982, and/or by other acts of discrimination.

2) Jurisdiction to decide these issues exists by virtue of Title VII of the Civil Rights Act of 1964, as amended [42 U.S.C. §2000e-16(c)].

3) Plaintiff has raised claims of



disparate treatment on account of his national origin. Under Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981) and McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973),

...[T]he plaintiff [first] has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate non-discriminatory reason for the employee's rejection." [McDonnell, supra], at 802, 93 S.Ct. at 1824. Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. Id. at 804, 93 S.Ct. at 1825.

Burdine, supra at 252, 101 S.Ct. at 1093.





The overall burden, however, remains upon the Plaintiff. Price Waterhouse v. Hopkins, 109 S.Ct. 1775, 1788 (1989).

4) If Defendant offers evidence for the Plaintiff's rejection, the Court must then decide whether the rejection was discriminatory within the meaning of Title VII. United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 714-15, 103 S.Ct. 1478, 1481, 75 L.Ed.2d 403 (1983). The McDonnell-Burdine presumption "drops from the case," Aikens, supra (citations omitted), and the Court must then determine "[whether] the defendant intentionally discriminated against the plaintiff." Aikens, supra at 715, 103 S.Ct. at 1482 (citations omitted).

The plaintiff retains the burden of persuasion... [H]e may succeed in this either directly by persuading the court that a discriminatory reasons more likely motivated the

The overall picture, however, remains  
upon the "ability" of the "Mediterranean"  
Hospitals, the 1910-1911, 1912-1913.

4) It is important to note that the  
the hospital's condition, the hospital was  
then decided whether the hospital was  
discriminatory with the meaning of this  
VII. United States Postal Service Board of  
Governors v. Alaska, 400 U.S. 111, 314-15,  
105 S.2d 479, 1963, 12 S.Ct. 412, 105  
11923. The Supreme Court's decision in  
"Oregon Iron Ore Case," 339 U.S. 196,  
1950, 11 S.Ct. 1201, 70 L.Ed. 1201, and the Court will  
then decide on "whether" the decision  
is essentially the same as the one in  
"Oregon Iron Ore Case," 339 U.S. 196,  
105 S.2d 479, 1963, 12 S.Ct. 412, 105

2. The Court's decision in Oregon Iron Ore Case  
The principle is that the  
of the hospital's condition  
is not a "discriminatory" act  
which is "discriminatory" in the  
sense of the word "discriminatory"  
which is "discriminatory" in the  
sense of the word "discriminatory"

employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.

Burdine, 450 U.S. at 256, 101 S.Ct. at 1095. In essence, the Court must decide which party's explanation of the employer's motivation it believes.

Aikens, 460 U.S. at 716, 103 S.Ct. at 1482. However, the Court may not impose its judgment on that of the employer's.

[T]he employer has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria. The fact that court may think that an employer misjudged the qualifications of the applicants does not in itself expose him to Title VII liability, although this may be probative of whether the employer's reasons are pretexts for discrimination.

Burdine, 450 U.S. at 259, 101 S.Ct. at 1097.

employer or indirectly  
by showing that the  
employer's proffered  
explanation is unworthy  
of credence.

Boyd, 450 U.S. at 122, 101 S.Ct. at  
1982. In essence, the Court said that  
which party's explanation of the  
employer's motivation is more  
likely, 450 U.S. at 116, 101 S.Ct. at  
1981. However, the Court may not require  
the employer to meet the employer's

the employer has disre-  
garded to choose among  
various qualified candidates,  
provided the decision  
is not based upon unlawful  
criteria. The fact that  
court may infer that an  
employer discriminated the  
qualification of the  
applicant does not in  
itself require the employer  
to disprove its motive.  
The employer may be able to  
show that the employer's  
reasons are legitimate  
business reasons.

Boyd, 450 U.S. at 122, 101 S.Ct. at  
1982.

5) Other than Plaintiff's subjective opinion there is no evidence, direct or circumstantial, to substantiate discrimination based on either national origin or retaliation. This Court holds that an unlawful motive played neither "some part in the employment decision," nor was a significant factor" in this case. Walsdorf v. Board of Commissioners for East Jefferson levee District, 857 F.2d 1047, 1052 and n.1 (5th Cir. 1988).

6) Defendant has articulated legitimate non-discriminatory reasons for its actions and they were not a mere pretext to mask discrimination.

7) Plaintiff has failed to show by a preponderance of the evidence that he was discriminated against on the basis of his national origin or retaliation for protected activities., Cf., Loeb v.

5) That the Plaintiff's subjective opinion there is no evidence, direct or circumstantial, of substantial discrimination based on either national origin or race. The Court holds that an individual relative plaintiff cannot prove an employment decision was a significant factor in this case. Salazar v. Board of Commissioners for East Jefferson Lewis Parish, 87-12 1947, 1952 and 1953 (1984)

6) Defendant has articulated legitimate non-discriminatory reasons for its actions and they were not a mere pretext to mask discrimination.

7) Plaintiff has failed to show by a preponderance of the evidence that he was discriminated against on the basis of his national origin or race. For protected activities. See, Smith v.

Textron, Inc., 600 F2d 103 (1st Cir. 1979); Lindsey v. Southwestern Bell Telephone Co., 546 f.2d 1123 (5th Cir. 1977).

8) Since the Plaintiff is not the prevailing party, he is not entitled to a declaratory judgment, injunctive relief, back wages, reasonable attorney's fees or costs of suit, or any other relief in this action. 42 U.S.C. § 2000e-6(k).

9) All costs are taxable against the Plaintiff.

10) Since Plaintiff has failed to show by a preponderance of the evidence that he was discriminated against on the basis of his national origin or retaliation the Defendant is entitled to a judgment.

11) Any conclusion of law which should more appropriately be a finding of fact is deemed so.

Section 100, 400 725 1150 1200

Section 1100, 400 725 1150 1200

Section 1200, 400 725 1150 1200

Section 1300, 400 725 1150 1200

Section 1400, 400 725 1150 1200

Section 1500, 400 725 1150 1200

Section 1600, 400 725 1150 1200

Section 1700, 400 725 1150 1200

Section 1800, 400 725 1150 1200

Section 1900, 400 725 1150 1200

Section 2000, 400 725 1150 1200

Section 2100, 400 725 1150 1200

Section 2200, 400 725 1150 1200

Section 2300, 400 725 1150 1200

Section 2400, 400 725 1150 1200

Section 2500, 400 725 1150 1200

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Section 2800, 400 725 1150 1200

Section 2900, 400 725 1150 1200

Section 3000, 400 725 1150 1200

Section 3100, 400 725 1150 1200

Section 3200, 400 725 1150 1200

Section 3300, 400 725 1150 1200

Section 3400, 400 725 1150 1200



SIGNED this 31st day of August, 1989.

WALTER S. SMITH, JR.  
UNITED STATES  
DISTRICT JUDGE

(2)  
No. 90-924

FILED

JAN 25 1991

JOSEPH F. SPANIOL, JR.  
~~CLERK~~

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**In the Supreme Court of the United States**

OCTOBER TERM, 1990

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GUADALUPE RAMOS, PETITIONER

v.

JAMES A. BAKER, III, SECRETARY OF THE TREASURY

---

ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

---

**BRIEF FOR THE RESPONDENT IN OPPOSITION**

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### **QUESTION PRESENTED**

Whether the courts below erred in concluding that respondent failed to show that his employer discriminated against him.



## TABLE OF CONTENTS

	Page
Opinions below .....	1
Jurisdiction .....	1
Statement .....	1
Argument .....	3
Conclusion .....	5

## TABLE OF AUTHORITIES

### Cases:

<i>Furnco Constr. Corp. v. Waters</i> , 438 U.S. 567 (1978) .....	4
<i>Goodman v. Lukens Steel Co.</i> , 482 U.S. 656 (1987) .....	3
<i>Graver Tank &amp; Mfg. Co. v. Linde Air Prods. Co.</i> , 336 U.S. 271 (1949) .....	3
<i>Price Waterhouse v. Hopkins</i> , 109 S. Ct. 1775 (1989) .....	5
<i>Texas Dep't of Community Affairs v. Burdine</i> , 450 U.S. 248 (1981) .....	4
<i>United States Postal Serv. Bd. of Governors v. Aikens</i> , 460 U.S. 711 (1983) .....	4
<i>Waldorf v. Board of Comm'rs</i> , 857 F.2d 1047 (5th Cir. 1988) .....	5
<i>Watson v. Fort Worth Bank &amp; Trust</i> , 487 U.S. 977 (1988) .....	4

### Statute:

Civil Rights Act of 1964, 42 U.S.C. 2000e-3(a) ..	2
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# **In the Supreme Court of the United States**

OCTOBER TERM, 1990

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## **OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. A1-A12) is unreported, but the judgment is noted at 915 F.2d 692 (Table). The decision of the district court (Pet. App. A13-A27) is unreported.

## **JURISDICTION**

The judgment of the court of appeals was entered on September 12, 1990. The petition for a writ of certiorari was filed on December 10, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## **STATEMENT**

1. Petitioner, an Hispanic male employee of the Internal Revenue Service (IRS) at Austin, Texas, was twice

denied promotion from a position at a GS-12 salary level to one at a GS-13 level. Pet. App. A6-A7, A15-A16. On both occasions, the IRS ultimately selected a white male. On August 13, 1987, after exhausting his administrative remedies, petitioner filed suit in the United States District Court for the Western District of Texas alleging that the IRS discriminated against him on the basis of his race, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-3(a). Pet. App. A2, A16.<sup>1</sup>

After a bench trial, the district court rejected all of petitioner's claims and entered judgment in favor of the IRS. As to petitioner's first failure to obtain promotion, in October 1981, the court determined that petitioner "was not placed on the 'Best Qualified List' \* \* \* because his numerical evaluation was too low," and concluded that petitioner's rating "accurately evaluated [his] performance" and that "[t]here is no evidence of any racial discrimination in this instance." Pet. App. A17. Although petitioner made the "Best Qualified List" on his second attempt at promotion in September 1982, the district court determined that "[t]he selected individual had a broader range of experience for the position than did [petitioner]. There is no evidence of racial discrimination in this instance." *Id.* at A18.<sup>2</sup> In general, the court rejected the argument that "the national origin of [petitioner] \* \* \* [was a] factor[] in the actions or inactions regarding [him]," *id.* at A20-A21, concluding instead that "there is no evidence, direct or circumstantial, to substantiate discrimination," *id.* at A25, and that peti-

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<sup>1</sup> In addition to challenging the two promotion decisions, petitioner also alleged several instances of retaliatory conduct based on prior complaints of discrimination. Petitioner did not raise his retaliation claims in the court of appeals, Pet. App. A3, and they are not now in issue.

<sup>2</sup> The court also rejected petitioner's retaliation claims.



tioner "failed to show by a preponderance of the evidence that he was discriminated against." *Ibid.*

2. In the court of appeals petitioner argued that "an employer cannot articulate nondiscriminatory reasons for an employment decision when the employer considers subjective facts because an employee cannot effectively rebut subjective evaluations." Pet. App. A8. In an unpublished per curiam opinion, the court rejected this contention and affirmed the district court's findings of fact. The court "refuse[d] to hold that an employer may not offer subjective evaluations in order to rebut a plaintiff's prima facie case," *id.* at A9-A10, reasoning that "many jobs necessarily involve subjective qualities." *Id.* at A10. The court noted that a plaintiff could rebut subjective evaluations through "witness testimony and proof of job experience and other qualifications," *ibid.*, and concluded that petitioner "offered no evidence of intentional discrimination." *Id.* at A11.

### ARGUMENT

The decisions of the district court and the court of appeals are correct and do not conflict with any decision of this Court or of any court of appeals. Accordingly, further review is not warranted.

1. Petitioner principally contends (Pet. 5-7) that the evidence showed the IRS's reasons for not promoting him to be pretextual. However, two courts have already soundly rejected this claim, both of them concluding that petitioner had presented no evidence at all of intentional discrimination. See Pet. App. A11, A25. This Court has declined "to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987) (quoting *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949)). Petitioner comes

nowhere near this standard, offering instead simply bald assertions of factual error.<sup>3</sup>

2. Petitioner contends (Pet. 6) that subjective criteria may not be used to rebut a prima facie case of discrimination. The court of appeals correctly rejected this argument, noting that "many jobs necessarily involve subjective [evaluation]." Pet. App. A10. That petitioner established a prima facie case is immaterial, for once the trial is complete, as was the case here, "the *McDonnell-Burdine* presumption [of unlawful discrimination] 'drops from the case.'" *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983), quoting *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981). This Court has often reviewed claims of discrimination against employers who distinguished between employees on the basis of subjective evaluation, and has consistently held that the basic inquiry remains whether a plaintiff has borne the burden of "persuading the trier of fact that the defendant intentionally discriminated against [him]." *Burdine*, 450 U.S. at 253. See *Furnco Constr. Corp. v. Waters*, 438 U.S. 567 (1978) (hiring decision based on personal knowledge of candidates and recommendations); *Burdine*, *supra* (discretionary decision to fire individual who was said not to get along with co-workers); *United States Postal Serv. Bd. of Governors v. Aikens*, *supra* (discretionary promotion decision). See also *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 988-989 (1988). Whatever the form of the IRS's rebuttal evidence, the ultimate burden of persuasion

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<sup>3</sup> As to the October 1981 promotion decision, petitioner asserts only that each of the three members of his evaluation panel gave him an identical numerical ranking and that this cannot be considered coincidental. Pet. 5. With respect to the September 1982 promotion decision, petitioner makes the conclusory assertion that the record contains "ample testimony" in support of his argument that the reasons offered by respondent were a pretext. *Id.* at 6.

fell on petitioner, a burden that—the district court and court of appeals firmly concluded—petitioner completely failed to meet.<sup>4</sup>

### CONCLUSION

The petition for writ of certiorari should be denied.  
Respectfully submitted.

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JANUARY 1991

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<sup>4</sup> Petitioner also argues (Pet. 7) that the courts below erred by failing to require the IRS to demonstrate a “business necessity” for its promotion decisions. This argument is incorrect, as it confuses the inquiry relevant to a “disparate treatment” case, where a plaintiff claims that he was discriminated against individually, with that relevant to a “disparate impact” case, where a plaintiff claims that a facially neutral employment practice has adverse effects on a protected group. In this case, one of disparate treatment only, see Pet. App. A3-A4, “business necessity” plays no part.

Finally, petitioner alludes (Pet. 5) to an alleged circuit conflict over the standard of causation to be employed in Title VII cases. See *Waldorf v. Board of Comm'rs*, 857 F.2d 1047, 1052 n.1 (5th Cir. 1988). However, not only has this Court resolved that conflict, see *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775 (1989), but it is irrelevant here, as petitioner presented no evidence at all of any kind of discrimination. There is therefore no need to address the standard of causation.